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Supreme Court of the United States

October Term, 1941

No. 1143

FRANHAM DISTRIBUTORS, Inc.
Petitioner

against

NEW YORK WORLD'S FAIR 1939 INCORPORATED
and SWIFT & COMPANY
Respondents

BRIEF OF RESPONDENT SWIFT & COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

The petitioner seeks a writ of certiorari addressed to the United States Circuit Court of Appeals for the Second Circuit, to the end that the affirmance by the Circuit Court of Appeals for the Second Circuit of the judgment of the United States District Court for the Southern District of New York may be reviewed here. The action was brought by Franham Distributors, Inc., against New York World's Fair 1939 Incorporated, to recover damages for alleged breach of contract, and against Swift & Company to recover damages for allegedly inducing the breach of the alleged contract. The action was commenced February 25, 1938, in the New York Supreme Court. On May 11, 1938, it was removed to the Southern District of New York. A

first trial was commenced on June 17, 1940, and on June 24, 1940, petitioner moved for non-suit on the ground it was not prepared to prove damage, and plaintiff's motion for non-suit was granted over objection by defendants. The case again came on for trial on October 7, 1940, and on October 10, 1940, at the conclusion of plaintiff's proof, was dismissed for failure to establish a *prima facie* case. The United States Circuit Court of Appeals for the Second Circuit affirmed with a decision written by Circuit Judge CHASE on December 8, 1941 [124 Fed. (2nd) 82]. Application for a rehearing was denied on January 8, 1942.

There is no question of Federal law. There is no question of a conflict with a decision of another Circuit Court of Appeals. None of the reasons set forth in Rule XXXVIII, 5 (a) and (b), is present in this case. The sole question presented to this Court is whether or not the plaintiff had proved implied or apparent authority on the part of two employees of, and an attorney for, New York World's Fair 1939 Incorporated, to waive the requirements of the Specifications of the Fair and the Bid of the plaintiff that all concession contracts must be in writing executed by a duly authorized officer of the Fair, and had proved that these two employees and a lawyer for the Fair had implied or apparent authority to enter into an oral contract for the operation of the hamburger and frankfurter concession. The District Court ruled that there was no evidence of implied or actual authority on the part of these three persons to waive the requirement that the contract be in writing or to enter into an oral concession contract, and the Circuit Court of Appeals affirmed this ruling on the facts. The opinion of the Circuit Court of Appeals for the Second Circuit by Circuit Judge CHASE [124 Fed. (2nd) 82] sets forth so accurately and concisely the questions presented on appeal by petitioner, and the answers thereto, that for the convenience of this Court a copy of the opinion is appended hereto.

The following language from Judge CHASE's opinion shows the precise nature of the question involved and, by the same token, makes obvious the reasons why certiorari should not be granted. *Inter alia* Judge CHASE wrote:

> "But where a bidder had been previously informed, as this plaintiff had been, that the only binding acceptance of a bid would be a notice in writing signed by a duly authorized representative of the Fair it was bound to know that any other mode of acceptance would be a departure from that prescribed and ostensibly unauthorized. The plaintiff was, accordingly, also bound to take suitable steps to ascertain the actual authority of those with whom it undertook to deal in a manner other than that which it had been informed was essential to the making of a valid contract. The unperformed duty of inquiry may, and often does, make it impossible to rely upon any so-called apparent authority of an agent. * * *
>
> "Moreover, here there was nothing to induce any belief on the part of the plaintiff's representatives that any of the men with whom they talked at the offices of the Fair in the Empire State Building intended to vary in any way the stated requirements for the binding acceptance of a bid by the Fair. The contract which had been prepared showed on its face that it was to be executed by the Fair, if at all, by someone other than any of them. * * * Since the plaintiff based its cause of action upon an oral acceptance of its bid before the formal rejection of all the bids, it was necessary for it to show that the men with whom it dealt had authority to accept its bid as it claims they did. * * * The evidence offered and received clearly fell short of providing the required proof and unless there was error in the exclusion of evidence the plaintiff sought to introduce the judgment must be affirmed.
>
> "* * * The judge, however, repeatedly assured the plaintiff's attorney that any evidence of agency he offered would be received and was well within the realm of sound discretion in being insistent that some of such proof precede the introduction of any so-

called admissions of the alleged agents. At most they were special agents who could not bind their principal by declarations, or what are sometimes called admissions, as to the scope of their authority. That had to be proved otherwise than by their own representations. * * * Furthermore, there is no reasonable cause for believing that the plaintiff could have shown any such declarations or admissions if answers to the excluded questions had been taken."

The United States Supreme Court, therefore, is being asked to issue a writ of certiorari, not to review a conflict between the different circuits, or a question of Federal law, or a question where a state court has decided a Federal question of substance not theretofore determined by this Court, or where a lower court has decided an important question of local law in a way in conflict with applicable local decisions, or an important question of Federal law which has not been settled by this court, or any of the other generic questions set forth in Rule XXXVIII, 5 (a) and (b), but is merely being asked to review the record on the facts to see whether or not the record discloses any evidence of implied or apparent authority on the part of these two employees and a lawyer for the Fair to enter into an oral contract, where the specifications of the Fair and the bid of the petitioner specifically provided that there would be no contract until made in writing and duly signed by an authorized officer of the Fair. The United States District Court for the Southern District of New York and the United States Circuit Court of Appeals for the Second Circuit held that there was no evidence of such implied or apparent authority and that alleged conversations as to the alleged making of an alleged oral contract were not admissible. The Supreme Court of the United States is now asked to be the third Federal court to pass upon this elementary question of evidence.

Statement of Facts

The complaint alleged two causes of action. The first was against New York World's Fair 1939 Incorporated and alleged that plaintiff and World's Fair entered into an oral contract concerning the operation by Franham of the frankfurter and hamburger concession, that World's Fair, despite the alleged ability and willingness of plaintiff to perform and despite alleged performance by plaintiff of all its promises to perform except as prevented by World's Fair, breached its contract by refusing to execute the agreement in regard to the frankfurter and hamburger concession. The second cause of action was against Swift & Company and alleged that while the alleged agreement between Franham and World's Fair was in full force and effect, and with full knowledge of the existence of said agreement, Swift & Company intentionally and knowingly and without justification or excuse, and for the purpose of obtaining for itself the said concession, induced World's Fair to breach its contract with Franham.

In answer to the first cause of action, World's Fair denied that any contract between it and Franham had been made, and that even if such a contract had been made and breached, Swift & Company did not induce the breach. In addition, World's Fair pleaded eight separate and complete defenses to the first cause of action: (1) that no lease was made in writing; (2) that no interest in land was created in plaintiff by any instrument in writing; (3) that the alleged concession agreement was not to be performed within one year and that neither the concession agreement nor any memorandum thereof was made in writing; (4) the printed Booklet of Concession Documents expressly provided that acceptance of a Proposal was to be in writing signed by a duly authorized representative of the Fair and that no other act of the corporation could constitute acceptance of a Proposal, and that

the Proposal of plaintiff was never accepted in writing; (5) the Booklet of Concession Documents provided in four places that the World's Fair reserved the right to reject any Proposal and that on or about February 22, 1938, World's Fair rejected all Proposals including bid of plaintiff; (6) the Booklet of Concession Documents expressly required bidder in its declaration to state names of all persons interested in its Proposal, but plaintiff's declaration was not an accurate statement as to persons interested in its Proposal; (7) the Booklet of Concession Documents provided that the Fair reserved the right to reject all Proposals and that the World's Fair could reject the Proposal of any bidder whose financial condition, organization and management did not appear adequate, and that the Proposal of plaintiff was rejected because the financial condition, organization and management of plaintiff did not appear adequate to World's Fair; (8) the Booklet of Concession Documents provided that World's Fair reserved the right to reject all Proposals if at any time prior to the acceptance the financial condition or organization or management of bidder was materially changed, and Proposal of plaintiff was rejected because it appeared to the satisfaction of World's Fair that after the filing of the bid the plaintiff's financial condition, organization and management had materially changed. The answer of Swift & Company on information and belief denied that Franham and World's Fair had entered into any such alleged contract and denied that Swift & Company had induced a breach thereof. Subsequently it was stipulated that Swift & Company's answer be amended to include the eight affirmative defenses pleaded by World's Fair.

The "Facts" as set forth in the petition and brief of petitioner, other than the somewhat inaccurate recital of the preliminaries leading up to the filing of bids, are almost entirely unsupported by evidence. They are based quite largely on opening statements of plaintiff's counsel

to the jury and on statements of Louis Golde, President of plaintiff, in an affidavit submitted in opposition to a motion for summary judgment, which affidavit, while included in the record before the Circuit Court of Appeals by stipulation of the attorneys for the respondents, was not before the trial court. Thus plaintiff's "Facts" by and large are mere statements of claim unsupported by testimony or evidence. Just as these "Facts" are unsupported by testimony in the record in the second trial, from which this appeal comes, so are they almost equally unsupported by the record in the first trial, other than plaintiff's oral testimony, in which first trial plaintiff prayed for non-suit because of its inability to prove damage. In neither trial have defendants had occasion or opportunity to put in their evidence or to deny from the witness stand the unsupported claims of plaintiff's openings to the juries. Moreover, the so-called facts recited by petitioner in its statement of facts, aside from the preliminaries leading up to the filing of bids, are also largely unsupported by any testimony given on the examinations before trial, with one or two minor exceptions, and were not before the trial court.

Since petitioner's statement of facts, other than as to the preliminaries leading up to the filing of bids, alleges matter almost entirely unsupported by evidence before the trial court, and is based largely on the impassioned claim of counsel "from memory" (f. 224) to the jury, said statement serves no purpose other than to window-trim the plaintiff's petition. We, therefore, deem it unnecessary to reply to such statements other than to traverse and deny most emphatically, vigorously and affirmatively the accuracy of such statements.

Swift & Company did not induce the breach of any alleged contract, and there is absolutely no testimony that it did, either in this record or in the record of the first trial. There is none in the examinations before trial of Swift & Company or World's Fair, and no such testimony

could ever find its way into the record on this controversy, for no such testimony or facts exist. To answer plaintiff's statement of alleged facts, or rather the condensation of the opening of plaintiff's counsel to the jury, which has been glossed up as facts, would require us to go outside this record, outside the record of the earlier trial failure by this plaintiff, and into examinations before trial—all outside the record before this court. This we deem both improper and immaterial as well as an imposition on this court. Consequently we refrain from replying specifically and seriatim. We must, however, point out as an illustration one such gross exaggeration and, indeed, misrepresentation. On page 7 of the petition it is stated that Mr. Harvey Gibson and Mr. Traynor, Treasurer of Swift & Company, are old and intimate friends and that Swift & Company is one of the largest depositors of Manufacturers Trust Company. There is no such testimony in this record, the record of the previous trial, or in any of the examinations before trial. As a matter of fact, Gibson testified when examined before trial that he knew Mr. Traynor, the financial Vice-President of Swift & Company, only in the same relationship that he knew thousands of depositors of Manufacturers Trust Company, and that he always addressed him as "Mr. Traynor." This would certainly indicate no "intimate" relationship. While Swift & Company is a depositor of Manufacturers Trust Company, and probably a large one, there is no testimony anywhere of it being one of the largest. However, to go on replying to plaintiff's statement of alleged "facts," practically all of which are *dehors* the record, serves no necessary purpose, and we only re-emphasize our emphatic and somewhat indignant denial of the alleged "facts" contained in plaintiff's petition and brief.

Since the latter part of 1936 defendant World's Fair had contemplated a frankfurter and hamburger concession for the Fair, a concession which involved the mainte-

nance of a great many stands throughout the Fair for the sale of frankfurters, hamburgers, coffee, tea and milk. The policy adopted by the Fair was to have a Concessions Pre-Qualification Board examine Information Returns submitted by various applicants for the concession.

The Information Return submitted by plaintiff is dated December 10, 1937 (fol. 477), recites the incorporation of plaintiff December 9, 1937 (475), but states that it had been in its then business for fourteen years (470), had operated concession privileges at five different places (470), was then engaged in the operation of food concessions at eight different places (469), and that the concessions had been operated by Tom D. Trulis (470). The Return is signed "Franham Distributors, Inc., by Tom D. Trulis, President" (477), and states that Trulis was President, Morris Golde was Vice President and Secretary, and Louis Golde, Treasurer (475, 476).

After the Concessions Pre-Qualification Board of the Fair, of which Commander Flanigan and Mr. Mermey were members, had examined the information submitted by plaintiff and others, approximately seventeen applicants were recommended for approval. To these the Fair issued Invitations to submit bids.

The Invitation, together with the terms and specifications of the bid are attached to the World's Fair answer as Exhibits B and B-1 and are printed in the record as Plaintiff's Exhibit 5 (69, 70, 502-645). Exhibit B consists of the Booklet of Concession Documents for the frankfurter and hamburger concession (507) and is dated December 20, 1937. Exhibit B-1 consists of a Supplement Sheet No. 1 dated December 28, 1937 (503). Both of these were furnished by defendant World's Fair to plaintiff as a bidder which had prequalified.

The Booklet of Concession Documents contained a table of contents which described the various parts of the Booklet (508). In the Booklet there were Notice to Prequalified Applicants (511), Information for Bidders (518),

Specifications (529), Proposal (546), and Specimen Form of Proposed Concession Agreement (565), to be entered into between the successful bidder, if any, and World's Fair. Across the face of the specimen contract there was stamped the word "Specimen".*

The Notice stated that sealed Proposals for the frankfurter and hamburger concession would be received by the Fair until noon February 1, 1938, and contained a general description of the concession, which, the Notice stated, was "outlined in the Concession Specifications" (511, 512). The Notice also stated that "All Proposals must be made upon the blank forms herewith provided", and "The Corporation reserves the right to reject any or all Proposals" (513).

The Information for Bidders set forth in the Booklet of Concession Documents, like the Notice, provided that the Fair had the right "to reject any or all Proposals" (521); and made a very definite provision as to the manner of acceptance of a Proposal. It expressly provided that (524, 525):

> "The acceptance of a Proposal will be a notice in writing signed by a duly authorized representative of the Corporation, *and no other act of the Corporation shall constitute the acceptance of a Proposal.*" (Italics added.)

The Specifications contained, *inter alia*, information as to the operation of frankfurter and hamburger stands, as to the location of the units, their construction and equipment, various rules and regulations, and the requirements as to payments to the Fair, participation percentage and debenture bonds. The Proposal or bid was to be filled in wherever their appeared blanks which required information.

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* The words "The following consists of a specimen contract with the word 'specimen' stamped across the face," which appear at 502 should not be printed at 502 but at 565.

Among the Proposals received was that of Franham, which stated that Franham Distributors, Inc., 522 Fifth Avenue, New York City, and Louis Golde and Morris Golde, of the same address, were the only persons interested in the Proposal (546-9), and was signed by Franham Distributors, Inc., by Louis Golde, President (559). Whereas Franham Distributors, Inc., had prequalified on the basis of Mr. Trulis' alleged fourteen years' experience, Franham was making its Proposal or bid for the concession without any provision binding it to utilize Mr. Trulis' alleged experience. As mentioned by counsel for plaintiff in his opening to the jury, Trulis resigned as President of Franham because he had "to be traveling to his restaurants at tracks at that time, and so on" (188).

By the terms of the Proposal, both the provisions of the Notice to Pre-qualified Applicants and the Information for Bidders became a part of the Proposal (554). It appears, therefore, that the provision in the Information for Bidders that a Proposal could only be accepted by a notice in writing signed by a duly authorized representative of the Fair, and that no other act of the Fair could constitute acceptance of a Proposal became a part of plaintiff's Proposal and there thus was clearly notice to plaintiff that a Proposal or bid could be accepted in no other way.

With this documentary background as a basis, plaintiff endeavored to introduce testimony of two alleged conversations for the purpose of establishing an oral acceptance of the Proposal. The first of these is alleged to have occurred on February 1, 1938, and is claimed by plaintiff to have been between Mr. James S. Hemingway, a member of the law firm of Lord, Day & Lord, of legal counsel to the Fair, not an officer or employee of the Fair and Mr. Louis Golde, President of plaintiff. The second is alleged to have occurred on February 2, 1938 between Mr. Hemingway, Mr. Maurice Mermey, acting Director of Concessions for the Fair, and Commander Howard A. Flanigan, at that time administrative assistant to the President of the

Fair, on the one hand, and Mr. Louis Golde, President of plaintiff, Mr. Max Natanson [who apparently was interested in the concession (309-10, 341) but whose name nowhere appears in either the Bidder's Information Return (466) or in plaintiff's Proposal (503-64)] and Julius Zieser, attorney for Franham at that time.

When plaintiff sought to introduce evidence as to these alleged conversations, the Court on objection excluded such testimony on the ground that there had been no showing that either of the aforementioned employees of the World's Fair or Mr. Hemingway, as its counsel, had been given authority by the World's Fair to waive the terms of the Proposal or to enter into an oral contract. (See 335-462, at 374 and 383.)

The pertinent portions of the record are found in folios 336 to 462. These folios demonstrate that the position of the Courts below was that it was incumbent upon the plaintiff to prove that one or more of these three men had express, apparent, or implied authority from the Fair to waive the stipulation in the Proposal that acceptance of a Proposal could only be in writing, and that one or more of them had authority to bind the Fair by an oral agreement.

Plaintiff relies for the authority of these men on concessions made by counsel for the Fair in the folios last above mentioned (336-462), and admits that it has no proof of authority beyond such concessions (447, 455). Commander Howard A. Flanigan at the time of the making of the oral contract on February 2, 1938, was administrative assistant to the President of the Fair (80, 99, 442). He was not the executive Vice-President of the Fair at that time, as plaintiff's petition and brief at numerous places seeks to imply. He was chairman of the Concessions Pre-qualification Board, and in that way had an intimate supervision of this and other concessions (368). Mr. Maurice Mermey at the time in question was the acting Director of Exhibits and Concessions (354). Among his

duties was to plan and develop the plan for the various types of concessions to be had, and to sell all of the domestic exhibit space (356). On page 14 of the petition it is stated that one of his duties was "to negotiate various contracts for concessions and exhibits." That is not so. Nowhere in the record is there any such testimony or stipulation. The folios cited by plaintiff on page 14 do not so state. In fact, they state quite the contrary (356-60). The fact that Mermey had no power to negotiate contracts appears specifically at folios 344, 356-63, and 413.

On page 15 of plaintiff's brief it is stated that:

> "Counsel for the plaintiff then offered to prove, in addition to what had gone before, that Mr. Mermey had authority to sell all of the domestic exhibit space to be sold *and to negotiate the various contracts for the concessions and exhibits* (413). *The court then noted that it considered this matter already proven* (413)." (Italics ours unless otherwise noted.)

This statement of counsel is either gross carelessness or deliberate misstatement. It was made by petitioner in these same words in its brief before the Circuit Court of Appeals, and its patent factual inaccuracy was pointed out in our answering brief in the Circuit Court of Appeals. To the same effect, at pages 14 and 38 petitioner says that it was among Mermey's duties "to negotiate the various contracts for the concessions and exhibits." The record at the folios in question reads as follows (411-14):

> "Mr. Pfeiffer: I offer to prove that Mr. Mermey, Maurice Mermey, was the director of exhibits and concessions; that his duties among others were to plan and develop the plan for the various type concessions to be had, to sell all of the exhibit space to be sold, that is, all of the domestic exhibit space exclusive of government space, to negotiate the various contracts for concessions and exhibits, and that he had that authority beginning with some time in January and continuing beyond the month of February——

The Court: Well, I haven't excluded any proof of his authority; if you want to show his authority I will be glad to receive it. Is that any different than the stipulation?

Mr. Pfeiffer: Yes.

The Court: In what respect?

Mr. Pfeiffer: There is this: He says here that he had authority to sell [all?] of the exhibit space to be sold, that is, all of the domestic exhibit space.

The Court: You have proved that.

Mr. Pfeiffer: Exclusive of government space, to negotiate the various contracts for concessions and exhibits, and that he was a member of the Pre-Qualifications Board, yes, sir. *That is, Mr. Daly did not go to that extent.*

Mr. Daly: I think that is all in the record.

Mr. Pfeiffer: All right. *Do you concede it to that extent?*

Mr. Daly: *No.* I concede what I conceded before. I can't go on conceding here, your Honor. I have made my concessions.

The Court: Is there any other proof you want to offer? Proceed.

Mr. Pfeiffer: I cannot offer any other proof at this time if you find——"

Despite the repeated assertion by the Court that the Court was willing to take any further proof that plaintiff had to offer to show express, apparent or implied authority on the part of Commander Flanigan, Mr. Mermey or Mr. Hemingway to make an oral contract, plaintiff offered no proof, and in fact stated that he had none (412, 414, 434, 436, 444, 445, 447-50, 455).

Mr. Hemingway was a member of Lord, Day & Lord, attorneys for the Fair. The concession with respect to him was that as a member of the firm of Lord, Day & Lord he was doing legal work for the Fair and that one of his duties was to draft all the contracts in the concessions department and render other legal services (337-8).

With respect to Mr. Hemingway, plaintiff claims it was reversible error for the Court to not admit the fol-

lowing answer given by Mr. Grover Whalen on examination before trial:

> "A. I don't know as I had any definite knowledge that this specific concession agreement was drawn except that it was in the line of Mr. Hemingway's responsibility to draw these immediately after bids were received and accepted by the corporation".

But Mr. Whalen specifically stated that he had no knowledge of this specific proposed concession agreement, which completely negatives any inference of an acceptance of the alleged contract by the Fair prior to the drafting of the proposed agreement by Hemingway, or of authority in Hemingway to speak for the Fair. Moreover, as Judge CHASE pointed out, "When Hemingway generally drew such contracts was obviously irrelevant to the question of his or Mermey's or Flanigan's actual authority to accept plaintiff's bid."

The plaintiff also assigns as error the refusal of the Court to admit Plaintiff's Exhibit 9 for Identification (404-10), which is an affidavit by Commander Flanigan reciting that on February 2, 1938 he was the administrative assistant to the President, "And in that capacity was responsible for the taking and consideration of bids for the concession involved in this action. Accordingly, I am familiar with the circumstances surrounding the taking and rejection of the Fair of the plaintiff's bid". But it is obvious that "taking and consideration of bids" does not include authority to *waive* the stipulation between the Fair and plaintiff contained in the Proposal that acceptance of a Proposal must be in writing signed by a duly authorized representative of the Fair and that no other act of the corporation shall constitute acceptance. The specimen contract itself, which formed a part of the Booklet of Concession Documents (507-645), specifically and in writing showed who such "duly authorized representative" of the Fair was to be, for the specimen contract indicated

that all concession contracts were to be executed for the Fair by Mr. Grover A. Whalen (639), its President, and the form of verification attached to the specimen contract had Mr. Grover A. Whalen's name printed in it, as President of the Fair, and as the person who would execute the contract on behalf of the Fair.

It is respectfully submitted that a reading of folios 336 to 462 will show the complete absence of error in this record and will demonstrate that the court time and again requested and suggested that plaintiff go forward with evidence, if there were any, to show that these men, or any of them, were authorized to act in the making of a contract for the World's Fair, to show that there was a course of conduct by the World's Fair with respect to other matters where oral contracts had been made, to show that there was ratification of any unauthorized act—in other words, any testimony that would indicate that these men or any of them had power to bind the Fair (444). The criticism on pages 17 and 35 of the petition of the oral opinion of the trial court (460) dissipates into thin air when read in its entirety in the record.* The real fact of this case is that there is no evidence of any authority, express, apparent or implied, on the part of any of these gentlemen to waive the provisions of the Proposal regarding the manner in which the Fair could be contractually bound, or to bind the Fair by an oral contract, despite the court's repeated suggestion that such evidence, if any, be adduced by plaintiff; and it was for that reason that the complaint was properly dismissed.

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* In the quoted language from the trial court's opinion as printed on page 17 of the petition, the word "authorities" is in error. It should read "parties."

POINT I

Even if plaintiff was the highest bidder and was so informed, that of itself would not give rise to a contract with defendant World's Fair.

As was pointed out above, the World's Fair in the Notice and in the Information for Bidders which was expressly made a part of the Proposal expressly reserved the right to reject any or all Proposals (513, 521), and plaintiff was therefore put on notice that regardless of whether or not it was the high bidder the Fair might reject its Proposal.

Moreover, as a matter of general authority the mere fact that a person submits the highest bid does not of itself give rise to a contract.

> *Ewing* v. *Mayor, etc., of New York,* 131 N. Y. 133 (1892);
> *Williston on Contracts* (1936), Sec. 31.

In *Leskie* v. *Haseltine,* 155 Penn. 98 (1893), where the defendant told the plaintiff bidder, "You are the lucky man," the Court held this statement merely showed defendant's recognition of the fact that plaintiff was the lowest bidder but did not bind defendant to enter into a contract with plaintiff. A similar result was reached in *Cedar Rapids Lumber Co.* v. *Fisher,* 105 N. W. 595 (Ia. 1906), where defendant told plaintiff, "You are low bidder. Come on morning train."

It thus becomes apparent that a mere statement on the part of Mr. Hemingway, Commander Flanigan or Mr. Mermey to the effect that Franham was the high bidder could not of itself be sufficient to establish an oral acceptance of the bid, even assuming that they or any one of them had been authorized to enter into such oral contract.

POINT II

Plaintiff must prove actual authority on the part of the Fair's representatives to accept the proposal.

Plaintiff claims only an oral acceptance of its Proposal (152, 153). The Information for Bidders, however, specifically provided that a Proposal could be accepted *only* by a notice in writing *signed* by a duly authorized representative of the Fair. This Proposal was signed for plaintiff by Louis Golde as President, and he was clearly on notice of this provision in the Information, which was made a part of the Proposal.

There is no question but that a corporation may protect itself against unauthorized oral contracts by providing in an application or contract form furnished by it that the proposal or bid to be made by a prospective customer or bidder will become a contract only when accepted by certain representatives of the corporation in writing.

> *Payne* v. *Yonkers Electric Light & Power Co.*, 147 App. Div. 682 (2nd Dept. 1911);
> *Goldberger, et al.* v. *Morris*, 94 N. Y. S. 359 (Sup. Ct., App. Term, 1st Dept. 1905).

In the first case there was a clause in an application for electric service, and in the second case a clause in a form of service contract, both of which clauses stated that only authorized agents could accept the offer. The Court held in each case that the limitation prevailed and that there was no binding contract until it was affirmatively shown that such a representative had signed the contract. The Court said in *Payne* v. *Yonkers Electric Light & Power Co., supra,* at page 684:

> "The application was not accepted according to its terms, and no agreement was executed by defendant.

> The plaintiff knew the terms of the instruments. He relied upon the alleged oral statement by Kugler or Fuller or both. Yet he knew that the defendant could not be so bound, inasmuch as he had stipulated that the agreement should not be binding until accepted by an executive officer, and that there should not be any modification of it by an agent or employee of the company, 'unless incorporated in writing herein before such acceptance.' "

Plaintiff was on full notice by the World's Fair that acceptance of the Proposal could only be by a *duly authorized* representative in *writing*. This obliged plaintiff to ascertain for itself the authority of the persons with whom it might deal, and it could not rely upon an alleged informal oral acceptance. The Fair was a public venture involving many hundreds of contracts and concessions in which the Federal Government, many of the states and the City of New York had invested public funds. It should have been obvious to those dealing with the Fair that a Proposal for one of the principal concessions could not be accepted in the offhand manner suggested by the plaintiff, especially in view of the specific notice that "the acceptance of a Proposal will be a notice in writing signed by a duly authorized representative of the Corporation, and no other act of the Corporation shall constitute the acceptance of a Proposal."

Admittedly Louis Golde was a man of many years of business experience (303-304). In fact, Mr. Golde testified (303-304) that he had been engaged in active business from 1889 to 1933. Surely a man of his experience should have known that such an important contract as the one for the operation of the hamburger and frankfurter concession of the World's Fair must of necessity be signed by a duly authorized representative of the Fair. As the Court, per CRANE, *J.*, said in *Union Car Advertising Co.* v. *Collier*, 263 N. Y. 386 (1934), at page 390:

> "We cannot imagine a man of Mr. Wineburgh's experience in the advertising business relying upon the representations of a general manager contrary to the express terms of the contract he was about to sign. He must have known that Dana had no power or authority to vary the written contract."

Plaintiff is not entitled to rely upon any so-called apparent or implied authority, which in some instances arises from the position of officers of a corporation with whom a third party deals. The law is well settled on this point, that one may rely on such "apparent" or "implied" authority only in cases of estoppel or *where there is no reason for inquiry as to the authority of the officer dealt with.*

As was stated in *Walsh* v. *Hartford Fire Insurance Co.*, 73 N. Y. 5 (1878), by ANDREWS, *J.*, at pages 10-11, the rule is:

> "The authority of an agent is not only that conferred upon him by his commission, but also as to third persons that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third persons, who believing and having a right to believe that the agent was acting within and not exceeding his authority, would sustain loss if the act was not considered that of the principal. (*Clark* v. *Metropolitan Bank*, 3 Duer, 248; Story on Agency, § 127; *Howard* v. *Braithwaite*, 1 Ves. & B., 209; *Stainer* v. *Tysen*, 3 Hill, 279; *Barnard* v. *Wheeler*, 24 Me., 279.) The doctrine is established to prevent fraud, and proceeds also upon the ground that when one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third person to do the injury. If, however, a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is in excess of or an abuse of the authority actually conferred, then manifestly the principal is not bound, and it is imma-

> terial whether the agent is a general or special one. The principal has the unqualified right, as between himself and the agent, to define and limit the agent's authority; to invest him with large or with restricted powers only. The agent, as we have seen, may sometimes bind the principal, although he transgresses his instructions, provided his apparent authority extends to the act done, but this is a rule of protection only."

In the present case Franham knew that the Proposal which it had in its hands and which it filled out could only be accepted in writing by a duly authorized agent of the Fair. This being so, they were under a duty of inquiring as to whether or not Hemingway, Flanigan or Mermey had ever received any authority to accept the contract either in writing or orally. The record shows no evidence of any such inquiry and, in fact, as was admitted on the trial of this case, there was no such inquiry.

In *Marvin* v. *Universal Life Insurance Co.*, 85 N. Y. 278 (1881), the Court said at page 282:

> "But a decisive difficulty remains. The policy contained an express provision that any alteration or waiver of its conditions, 'unless made at the head office, and signed by an officer of said company, shall not be considered as valid.' Granting, therefore, that Henkle was shown to be a general agent of this company; granting also what was not proved, but perhaps may be inferred from the character of his office (*Carrol* v. *Charter Oak Ins. Co.*, 1 Abb. Ct. App. 318; *Sheldon* v. *The Atlantic Fire and Marine Ins. Co.*, 26 N. Y. 465), that he had authority, unless restricted, to waive conditions; the difficulty remains that he was in that respect restricted, and his authority limited and curtailed, by an express provision in the policy itself, thus brought to the knowledge of the assured, and, therefore, had no power, in and of himself, to waive the condition of payment, or agree that it should be waived."

See also

Bickford v. *Menier*, 107 N. Y. 490, 494 (1887).

In *Cullinan* v. *Bowker*, 180 N. Y. 93 (1904), the Court, per GRAY, *J.*, said at page 97:

> "Reference is made by the appellant to decisions in cases arising upon contracts of insurance and they furnish many illustrations of the extreme lengths to which the courts have gone in enforcing the liability of insurance companies, upon obligations created for them by their agents with an apparent disregard of the conditions imposed upon the exercise of their powers. However far those decisions have gone, in this court, certainly, I think I am safe in observing that there has steadily been an observance of this qualification, that, if the limitations upon the agent's authority to act are known to the person with whom he is dealing, or if the transaction is such as to charge him with the duty of inquiring into the extent of the agent's authority to do the particular act, the principal will be protected, if the act be unauthorized, or in clear excess of the agent's powers, and if the principal be an innocent actor in the transaction."

In *Drennan* v. *Sun Indemnity Co.*, 271 N. Y. 182 (1936), the Court, per LEHMAN, *J.*, said at pages 186-187:

> "The company is bound by any acts or representations of its agents within the scope of this apparent authority. Secret limitations will not avail where the company holds out its agent as having plenary authority; but where the company gives to an assured notice of a limitation upon the authority of an agent, the assured can hold the company upon an agreement made by the agent in disregard of such limitations only where it is shown that the company has removed the limitations.
>
> We have said long ago that 'the effect of such stipulations in a contract of insurance as well as the manner in which they may be modified or waived by agents of the company have been so thoroughly dis-

cussed, and so clearly pointed out that a reference to some of the more recent cases on the subject is all that is needful here. (*Allen* v. *German Am. Ins. Co.*, 123 N. Y. 6; *Quinlan* v. *Providence W. Ins. Co.*, 133 id. 356; *Messelback* v. *Norman*, 122 id. 583; *Walsh* v. *Hartford Ins. Co.*, 73 id. 5.) Under the doctrine of these cases, we see no escape from the result which the parties to the contract stipulated should follow the breach of the condition, with respect to subsequent insurance, unless consent was given in the manner provided.' (*Baumgartel* v. *Providence-Washington Ins. Co.*, 136 N. Y. 547, 551.)

It is true that we have also held that the insurance company may itself waive any contractual condition or restriction in a policy; even the condition that a waiver, extension or change must be in writing. Such waiver may be established by a course of conduct which gives rise to an estoppel or by word or act of a duly authorized agent. (*Pechner* v. *Phoenix Ins. Co.*, 65 N. Y. 195; *Manchester* v. *Guardian Assur. Co.*, 151 N. Y. 88; *Smaldone* v. *President, etc., of Insurance Co. of North America*, 162 N. Y. 580.) That does not mean that the provisions of a policy limiting the powers of an agent, or restricting the manner in which the policy may be extended or its provisions waived, are not given their intended effect. Such provisions are intended to be effectual unless or until the parties agree otherwise and the company can be bound by an agreement of waiver only where such agreement is made by an agent who is authorized to make it."

POINT III

There is no evidence of any authority, express, apparent or implied on the part of either Flanigan, Mermey or Hemingway to orally bind the World's Fair by contract.

There is no evidence of any act of World's Fair, or of anything being done with its knowledge or the knowledge of its officers, which could have suggested that Hemingway, Flanigan or Mermey had authority to make an oral contract when the Proposal specifically provided that the only way it properly could be accepted was in writing by a duly authorized agent. As the Court, per VAN KIRK, *P. J.*, said in *Bussing* v. *Lowell Film Productions*, 233 App. Div. 493 (Third Dept. 1931), aff'd 259 N. Y. 593, at page 495:

> "No act of the defendant, and nothing done with its knowledge or the knowledge of any of its officers, had come to the attention of the plaintiff which could have suggested that Russell had authority to make the contract on which the action is brought, or to rent an office in New York for the defendant. 'The principal is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent. (*Edwards* v. *Dooley*, 120 N. Y. 540, 551.)' (*Conant* v. *American Rubber Tire Co., supra*, 329.) The fact of agency or the extent of his powers may not be established by the representations of the agent. *Wakefield Rattan Co.* v. *Tappen*, 80 Hun, 219.)"

In the case at bar, plaintiff had notice that the acceptance of a Proposal would be by a notice in writing, signed by a duly authorized representative of the Fair and that no other act of the corporation could constitute the acceptance of a Proposal (524). Not only did plaintiff have such

notice but since such notice was specifically incorporated in plaintiff's Proposal, plaintiff in legal effect acquiesced in and agreed to it. Yet the plaintiff insists that it has a right to show what a lawyer for the Fair is alleged to have said, what a director of concessions and exhibits is alleged to have said, what the administrative assistant to the president is alleged to have said, *without laying any foundation* other than showing that the lawyer had performed legal services for the Fair (337), that the administrative assistant to the President had that title and was a member of the Concessions Pre-Qualification Board (366) and that the director of concessions and exhibits was also a member of the Concessions Pre-Qualification Board and was engaged in getting people interested in concessions and exhibits (344)! Knowing that the stipulation between the Fair and the bidder was that the acceptance must be in writing by a duly authorized representative and knowing that the specimen contract in the Booklet of Concessions indicated clearly *that only Mr. Whalen, the President of the Fair,* was the authorized representative (640), nevertheless the plaintiff made no effort to find out if, by any chance, any of the three abovementioned men had been designated as a duly authorized representative to sign or to act for the Fair. Moreover, there is no evidence in the record of any course of conduct, or of any express, apparent or implied authority (374, 383), which would indicate that these men or any of them had authority to enter into such contract as is alleged by the plaintiff. Nor is there any evidence in the record of any other contract signed by any of these men or of any contract made orally by any of these men or by anybody else connected with the Fair. Nor is there any evidence of any holding out by the Fair that any of these men had power to bind the Fair in any way or vary the terms of the written Proposal. Instead, out of a clear blue sky, plaintiff seeks to bind the Fair to an alleged oral contract which would be in complete derogation of the

notice that had been given and accepted and the stipulation that had become a part of the Proposal, without introducing a scintilla of evidence as to the express, apparent or implied authority of any of these men to bind the Fair or vary the written notice and stipulation that provided that acceptance could only be in writing by a duly authorized representative of the Fair.

The testimony of Grover Whalen on examination before trial, that it was in the line of Mr. Hemingway's work for Mr. Hemingway to draw concession documents after bids were received and accepted, is not a holding out of Mr. Hemingway by the Fair to third parties as a person duly qualified to vary the terms of the written proposals, or to make oral contracts. It is not a statement of either actual or implied authority for Mr. Hemingway to deal with third parties. It is not a statement that this alleged oral contract had already been made by the Fair. (Hemingway is alleged to have had the written contract form prepared *before* the alleged oral acceptance by Flanigan and Mermey.) It at most might be considered a statement of the routine in which Hemingway usually worked, and has no bearing on the question as to whether or not there was implied authority in any of these men so far as third persons were concerned to vary the specific stipulation between the Fair and the bidder that any contract would exist until an acceptance in writing signed by a duly authorized representative of the Fair had been submitted.

Every authority cited by plaintiff in its brief, both from the quoted portions as well as from a complete reading of the opinions themselves, either entirely supports the position of respondents or has absolutely no bearing upon the issues here involved. That such is the fact with respect to the quotations from authorities in plaintiff's brief is obvious from a reading of said quotations in plaintiff's brief and seems to require no further comment. As an illustration, we point to the quotation from *Martin* v. *Webb*, 110 U. S. 7, found on page 40 of plaintiff's brief.

POINT IV

The burden of proving authority was on the plaintiff.

As has been pointed out above, the plaintiff did not introduce even a scintilla of evidence of any authority express, apparent or implied, on the part of Mr. Hemingway, Commander Flanigan or Mr. Mermey to bind the Fair as to the contract herein alleged or as to any other similar contract. Petitioner argues that there was evidence admitted sufficient to satisfy the requirement of a preliminary showing of authority. This statement is untrue. As the record clearly shows, no evidence was introduced as to the authority of any of the aforementioned three men to bind the Fair by written or oral contract. As to the burden of proof, the authorities are clear. The rule is that a party who seeks to charge a principal for a contract allegedly made by his agent must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. For example, in *Schutz* v. *Jordan*, 141 U. S. 213 (1890), the Court, per Mr. Justice BREWER, stated at page 218:

> "A party who seeks to charge a principal for the contracts made by his agent must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend that they had made out a cause of action against the defendants, by proving that Hewes had made a purchase in their name. Of course they must go further, and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred."

In *Adams* v. *Barron G. Collier, Inc.*, 73 F. (2d) 975 C. C. A. 8th (1934), the Court per BELL, *D. J.*, said at page 978:

"The appellant, having asserted agency, had the burden of proving it. *Schutz* v. *Jordan,* 141 U. S. 213, 11 S. Ct. 906, 35 L. Ed. 705; *Texas Company* v. *Quelquejeu* (C. C. A.) 263 F. 491; *Knox College* v. *Gray* (C. C. A.) 299 F. 179."

In *Ferro Concrete Const. Co.* v. *United States,* 112 F. (2d) 488, C. C. A. 1st (1940), the Court per PETERS, *D. J.,* said at pages 490-491:

"In considering evidence as to the authority of Starr to make the alleged new contract with Luchini the rule as to the burden of proof is important. It was thus stated in the case of *Owens Bottle-Machine Co.* v. *Kanawha, B. & T. Co.,* 4 Cir. 259 F. 838, 842:

'It is of course an elementary rule of law that a person dealing with an alleged agent is bound to ascertain his authority, and that, when suit is brought against the principal in respect of an act of such agent, the burden is upon the plaintiff to establish, not only the fact of agency, but that the act upon which he relies was within the agent's authority.'

'A party who seeks to charge a principal for the contracts made by his agent must prove that agent's authority; and it is not for the principal to disprove it.' *Schutz* v. *Jordan,* 141 U. S. 213, 11 S. Ct. 906, 907, 35 L. Ed. 705."

And in Mechem on the Law of Agency (1914), Section 255, it is stated:

"§ 255. AUTHORITY MUST BE PROVED—BURDEN OF PROOF—In the first place it is to be recalled that, except in the few cases already referred to wherein the law confers authority, the law itself makes no presumption of agency: it is always a fact to be proved; and the person who alleges it has the burden of proving it by a preponderance of the evidence."

POINT V

The dismissal of the complaint as against defendant Swift & Company was proper.

Obviously, before plaintiff could succeed in the second cause of action of the complaint, alleging that Swift & Company had induced a breach of the contract, the making of the contract had to be proved, as petitioner admits. There being no evidence of any contract, the motion of Swift & Company to dismiss the complaint as against Swift & Company on the merits (457) was properly granted by the trial Court, and affirmed by the Circuit Court of Appeals. On petition for rehearing to the Circuit Court of Appeals, the question as to whether or not such dismissal should have been without prejudice was vigorously argued for the first time by petitioner in a nine-page petition, and petition for rehearing was denied by the Circuit Court of Appeals. Obviously a dismissal of the complaint on the merits was proper because the trial on the alleged cause of action against New York World's Fair for breaching a contract and against Swift & Company for allegedly inducing a breach of an alleged contract was a trial on the merits, and the plaintiff failed. There is absolutely no merit to the contention that the dismissal should have been "without prejudice."

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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Of Counsel.

[APPENDIX FOLLOWS]